Supreme Court, U.S.
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No. 95-1520

In The

Supreme Court of the United States

October Term, 1995

THE STATE OF ARIZONA, *et al.*,

Petitioners,

v.

EVAN ARTHUR HOOK, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED

A state official violated a consent decree by an order of his own; he took steps toward withdrawing that order a few minutes before the federal district court was about to hear a criminal contempt proceeding. May the district court find a civil contempt and assess counsel fees for the labors involved in bringing the officer to court and inducing him thereby to terminate his illegal conduct?

PARTIES TO THE PROCEEDING BELOW

Petitioners (appellants below) are the State of Arizona, Terry L. Stewart, the current Director of the Arizona Department of Corrections, and Samuel A. Lewis, who held the position of Director during the proceedings below.

Respondents (appellees below) are members of all successors to members of a class of Arizona prison inmates claiming under a consent decree between these parties.

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Respondents submit that the Petition for Writ of Certiorari should be denied.

OPINIONS BELOW

The summary order of the court of appeals affirming is correctly contained in the Petition as Appendix A. The opinion of the United States District Court for the District of Arizona, not published, is correctly included in the Petition as Appendix B.

STATEMENT OF JURISDICTION

On October 19, 1995, the District Court for the District of Arizona entered its judgment with an extensive opinion correctly set forth as Appendix B to the Petition. The Ninth Circuit Court of Appeals summarily affirmed "For the reasons stated in the district court's Orders" and petition for rehearing en banc was denied. *See* App. A, p. 2, and App. D of the Petition, p. 2 ("no judge of the court has requested a vote on the suggestion for rehearing en banc"). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 401:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

One issue in the courts below was whether the fees were to be paid by the Director of Corrections personally or by the State.[1] The payment is secured by a supersedeas bond with ultimate responsibility on the State, and no issue relating to the fees is brought here on the petition.

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[1]Those fees, which were sharply reduced from the norm, were committed by court-appointed counsel to a public charity since counsel believed that it had a professional duty to protect the integrity of an article III court.

REASONS FOR DENYING THE PETITION

In 1973, the Arizona Department of Corrections and representatives of the prisoners entered into a consent decree concerning items that could be delivered to prisoners. Some years prior to the instant case, by his own fiat, the Director entered an order which conflicted with the stipulated decree. The Ninth Circuit Court of Appeals then expressly told him that if he wished to have the order altered, he could not do it by fiat, but must apply to the Court for a modification. The exact language of the Court of Appeals was "[a]s the district court held, the proper approach to this problem is to bring a Rule 60(b) motion; the Department cannot simply disregard the consent decree." *Hook v. State of Arizona*, 972 F.2d 1012, 1017 (9th Cir. 1992).

In the instant case, the Director did it again. Entirely on his own, according to his testimony, he issued a new order conflicting with the consent decree. As the district court's opinion, adopted by the Circuit, shows, he simply ignored the earlier mandate of the Ninth Circuit that if the stipulated order was to be modified, an application must be made to the Court to modify it.

The class then made clear that if the order were not withdrawn, it would file for criminal contempt. The order was not withdrawn and, indeed, was reaffirmed. An application for criminal contempt was then filed with hearing to be held at 3:00 p.m. on a given day. A few minutes before the hearing, counsel for the class was informally told that the order would be withdrawn. At the hearing at three o'clock, the court was so advised. The class immediately, and in open court, withdrew its request for criminal contempt, but asked for a civil contempt order and for a remedy covering the costs the class had been put to in bringing the matter to the court. The order was not, in fact, formally withdrawn until after that hearing.

The trial court in an extensive opinion found that there had been a civil contempt and assessed the fees as compensation.

The entire argument of the Director here is that no contempt ever occurred because, as the trial court expressly found, under threat of criminal contempt the Director withdrew the order before it could be enforced. The notion of the Director here is that he may operate in flagrant criminal contempt up to the very moment of enforcing an illegal order and then dance away from it with no consequences.

The contempt was the issuance of the illegal order in the first place without obeying the mandate of the Ninth Circuit to apply for a modification of the order if the Director wanted a modification.

In finding Director Lewis in contempt the district court acted well within the scope of its authority. Civil contempt is appropriate against state officials for failing to comply with court orders, *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L. Ed. 2d 522 (1978). As background, this Court stated in part:

> In exercising their prospective powers under *Ex parte Young* [, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),] and *Edelman v. Jordan*, [415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974),] federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties. A criminal contempt prosecution for "resistance to [the court's] lawful . . . order" may result in a jail term or a fine.

Id. at 690, 98 S. Ct. at 2573. *See also Newman v. State of Alabama*, 683 F.2d 1312, 1318 (11th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983).

The fact that Director Lewis capitulated in the face of pressure just short of yet another court order is irrelevant. According to the Supreme Court, "the difference between retroactive and prospective relief 'will not in many instances be that between day and night.'" *Hutto*, 437 U.S. at 691 (quoting *Edelman v. Jordan*, 415 U.S. at 667). The *Hutto* Court thus held that an award of attorneys' fees against corrections officials for bad faith in failing to comply with a court order "served the same purpose as a remedial fine imposed for civil contempt," and "the allowance thereof may incline the Department to act in such a manner that further protracted litigation about the prisons will not be necessary." *Id.* at 691.

Appellants' fuss about the withdrawal is an attempt to muddy the waters in a clear area. Quite simply, no "fine" for contempt after the order was withdrawn was assessed, and no punishment for noncompliance was imposed. Rather, appellees were awarded the attorneys' fees they incurred in bringing the contempt to the court's attention. Not only was this appropriate, it would have been improper not to award those fees. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1367 (9th Cir. 1987) (assessing attorneys' fees in civil contempt is appropriate); *Donovan v. Burlington Northern, Inc.*, 781 F.2d

680, 684 (9th Cir. 1986) (regardless of whether the contempt was willful, "the cost of bringing the violation to the attention of the court is part of the damages suffered by the prevailing party") (quoting *Perry v. O'Donnell*, 759 F.2d 702, 705 (9th Cir. 1985)). "[T]he trial court should have the discretion to analyze each contempt case individually and decide whether an award of fees and expenses is appropriate as a remedial measure". *Id.*

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED.

April 1996.

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